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IN THE

# Supreme Court of the United States

CITY OF COLUMBUS, ET AL

*Petitioners,*

v.

OUR GARAGE AND WRECKER SERVICE, INC. ET AL.

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF *AMICI CURIAE* CITY OF TOLEDO AND THE OHIO MUNICIPAL LEAGUE

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## BRIEF OF RIGHT/CONSENT OF THE PARTIES

The City of Toledo does not require the consent of the parties in order to file an *amicus* brief, pursuant Rule 37.4 of the rules of this court. The Ohio Municipal League, *amicus curiae,* received the consent of both parties to participate in this action, pursuant to Rule 37 of the rules of this court. Such consent was filed with this court in the original *Amicus Curiae* Brief in Support of Petition for *Writ of Certiorari* . Additionally, the Ohio Municipal League is composed of municipalities which, by rule, like the City of Toledo, do not require the consent of the parties to file an *amicus* brief.

## QUESTION PRESENTED

Does 49 U.S.C. § 14501(c) of the Interstate Commerce Act permit cities to enact safety regulations regarding local tow-truck operations, as the Second Circuit and the California Court of Appeals have held, or does it preempt such regulations, as the Fifth, Sixth, Ninth and Eleventh Circuits have held?

## PARTIES TO THE PROCEEDINGS

Petitioners are (1) the City of Columbus, (2) the Director of Public Safety for the City, Mitchell Brown, and (3) the License Supervisor of the Public Safety Department for the City, Bobbie Beavers. Respondents are (1) Ours Garage and Wrecker Service, Inc., and (2) the Towing and Recovery Association of Ohio.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-A) is reported at 257 F.3d 506 (6th Cir. 2001), and the district court's opinion (Pet. App. 33-A) is unreported.

## JURISDICTION

The court of appeals entered judgment on June 19, 2001. Pet. App. 3-A. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1). This court accepted jurisdiction on January 4, 2002.

## CONSTITUTIONAL PROVISIONS

Article I, Section 8 United States Constitution:

"The Congress shall have Power ***

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ***"

The Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

## STATUTORY PROVISIONS

49 U.S.C. § 14501(c)(1) and (2) of the Interstate Commerce Act ("ICA") provide:

(1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.—Paragraph (1)—) shall not restrict the safety regulatory authority of a State with respect



to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

## THE OHIO CONSTITUTION

Article XVIII, Section 3:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

## STATEMENT OF FACTS AND CASE

The *amici* incorporate, by reference, the **Statement** of the Petitioner, the City of Columbus.

## SUMMARY OF ARGUMENTS

Different Circuit Courts and state courts have interpreted 49 U.S.C. § 14501 in dramatically different ways. In the instant case, the Sixth Circuit Court of Appeals has improperly construed the statute to prevent the City of Columbus from enacting and enforcing reasonable highway safety regulations against the respondent.

The *amici curiae*, the City of Toledo, Ohio and the Ohio Municipal League, seek to add their voices in support of the position of the City of Columbus. The Sixth Circuit court of Appeals, and certain other courts, have misinterpreted 49 U.S.C § 14501 because Congress did not intend to interfere with **intra**state distribution of police powers when drafting § 14501(c) of the Interstate Commerce Act. Congress drafted section 14501(c)(2)(A) as a safety exception to preemption under section 14501(c)(1). In section 14501(c)(2)(A), Congress expressly provided section 14501(c)(1) "shall not restrict the safety regulatory authority of a State." Congress remained silent as to "political subdivision[s]" precisely because it did not want to interfere with a **intra**state distribution of police power. States, in accordance with their police power and state law, may or may not delegate safety regulatory authority to political subdivisions.

Pursuant to Article I, Section 8 of the Constitution of the United States, doubt would arise if Congress attempted to prevent political subdivisions from exercising State police power over highway safety, expressly authorized in section 14501(c)(2)(A). Similarly, Congress could not presume to grant police power to political subdivisions if the State's laws were silent on that issue. Thus, Congress was silent on the issue in section 14501(c)(2)(A).



Consequently, 49 U.S.C. § 14501(c) permits cities to enact safety regulations regarding local tow-truck operations if the State's laws delegate such authority to the city.

By ruling as it has, the Sixth Circuit Court of Appeals has subjected 49 U.S.C. § 14501 to "constitutional doubt." The lower court's opinion seems to suggest that Congress has the authority to control the **intra**state distribution of police powers. This interpretation would permit Congress to exercise power which exceeds its Constitutional power to regulate **inter**state commerce, pursuant to Article I, Section 8 of the Constitution, which is contrary to, and in violation of, the Tenth Amendment to the United States Constitution. The *amici* respectfully suggest that the doctrine of "constitutional doubt" should be applied in this matter. The statute, which is susceptible to different interpretations, should **not** be interpreted in a way which implicates a violation of the fundamental principles of federalism. Thus, the interpretation of the statute, which is proposed by the City of Columbus, should be adopted by this court as the law of the land.

## ARGUMENT

### Delegating Regulatory Authority to Political Subdivisions

Congress did not intend to prevent a State from delegating its safety regulatory authority to a political subdivision under 49 U.S.C. § 14501(c)(2)(A). *Ace Auto Body & Towing, LTD. v. City of New York*, 171 F.3d 765, 775-76 (2d Cir. 1999); *Hott v. City of San* Jose, 92 F. Supp..2d 996, 999-1000 (N.D. Cal. 2000); *New Orleans Towing Assoc. v. City of New Orleans*, No. Civ. A. 99-3131, 2000 WL 193071, at *8-11 (E.D.La. Feb. 15, 2000); AJ's *Wrecker Serv., Inc. v. City of Dallas* , Nos. 97-1311D, 97-2398D, 1998 WL 185521, at *3 (N.D. Tex. April 15, 1998);

*Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711, 726-27 (S.D. Tex. 1996). *See Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-09, 611-12, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991).

In analyzing the intent of Congress, the courts have traditionally "'start[ed] with the assumption that the historic police powers of the States [are] not to be superceded . . .' unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)).

It is not disputed among the Circuits that Congress creates an exception to preemption for state safety regulations, under § 14501(c)(2)(A). *Petrey v. City of Toledo*, 246 F.3d 548, 559-60 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050-51 (9th Cir. 2000); *Ace* at 772-75; *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545-48 (11th Cir. 1998). Congress expressly says that it "shall not restrict the safety regulatory authority of a 'State.'" 49 U.S.C. § 14501(c)(2)(A).

The *amici* assert that Congress is silent as to "political subdivisions," in § 14501(c)(2)(A), precisely because Congress does not want to interfere with **intra**state distribution of police power. It is up to the States, not Congress, to distribute safety regulatory authority within the State, if the State's laws so provide.

This contention is supported by the analysis of Second Circuit and by several district courts: "[L]egislative history indicates that state safety regulatory authority (including presumably the authority to delegate) was to be 'unaffected' by the preemption statute." *Ace* at 775-76 (citing *See* H.R. Conf. Rep. No. 103-677, at 84, 85, *reprinted in* 1994



U.S.C.C.A.N. at 1756, 1757; *AJ's Wrecker* at *3; *Harris* at 726-27; *see also Wis. Pub. Intervenor* at 607-09, 611-12 (noting that although FIFRA expressly permits only "States" to regulate pesticides, the most "plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities"); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 54-55 (2d Cir. 1988) (holding that usage of the term "state" in OSHA preemption provision also encompassed municipalities)).

**Intrastate Distribution of Police Power: Ohio**

Pursuant to Article XVIII, Section 3 of the Ohio Constitution:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The constitutional grant of authority to the City of Columbus, under the Ohio Constitution, expressly permits the enactment safety regulations regarding tow-truck operations which do not conflict with state laws. This is the exact type of **intra**state distribution of police power that Congress did not intend to prohibit under § 14501(c)(2)(A).

The Sixth Circuit Court of Appeals, and certain other courts, have held the safety regulation exception to preemption provided for in § 14501(c)(2)(A) does not apply to political subdivisions because political subdivisions are

mentioned in § 14501, but not in § 14501(c)(2)(A) specifically. *Petrey v. City of Toledo*, 246 F.3d 548, 560 (6th Cir. 2001); *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050-51 (9th Cir. 2000); *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545-48 (11th Cir 1998). These courts reason that Congress acted intentionally in excluding the particular language of "political subdivision[s]," and thus "while states may regulate the safety of motor carriers, political subdivisions may not." *Petrey*, 246 F.3d at 561. *See Tocher*, 219 F.3d at 1051; *R. Mayer*, 158 F.3d at 545.

Even if Congress intentionally omitted the particular language of "political subdivision[s]," this could mean Congress consciously did not wish to interfere with **intra**state distribution of police powers. Congressional silence as to the power of "political subdivision[s]" may well have been used so as not to interfere with a given state's distribution of police power, which may or may not delegate regulatory authority to political subdivisions. In doing so, Congress avoided overstepping its constitutional authority to regulate only **inter**state commerce, not the intrastate distribution of police power.

## The Doctrine of Constitutional Doubt

This Court has recently described the doctrine and rationale of "constitutional doubt":

> "As Justice Holmes said long ago: **'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'** *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S.Ct. 658, 659, 60 L.Ed. 1061 (1916) (citing *United States ex rel. Attorney General v. Delaware & Hudson Co.*,



> 213 U.S. 366, 408, 29 S.Ct. 527, 535-536, 53 L.Ed. 836 (1909)); see also *Ashwander v. TVA*, 297 U.S. 288, 348, 56 S.Ct. 466, 483-484, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). **'This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.'** *Rust v. Sullivan*, 500 U.S. 173, 191, 111 S.Ct. 1759, 1771, 114 L.Ed.2d 233 (1991); see also *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-307, 44 S.Ct. 336, 337-338, 68 L.Ed. 696 (1924)." (Emphasis added.) *Almendarez-Torez v. United States*, 523 U.S. 224 at 237-238, 118 S.Ct. 1219 at 1227-1228, 140 L.Ed.2d 350 (1998).

The doctrine does not require a finding that the statute is unconstitutional; rather, the inquiry is limited to a determination whether serious constitutional doubt exists as to a viable interpretation of the statute. *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, at 408, 29 S.Ct. 527, at 535, 53 L.Ed. 836 (1909).

It is with this framework in mind that the *amici* raise the following argument.

## The Interpretation Riddled with Constitutional Doubt

Congress, according to the Sixth Circuit and other courts, has authorized the States to regulate highway safety, but prevented the political subdivisions of states from doing so. By ruling as they have, these courts have held that Congress has the authority to control the **intra**state distribution of police powers. This interpretation grants to Congress power which exceeds its Constitutional power to regulate **inter**state commerce, pursuant to Article I, Section

8 of the Constitution. It is respectfully submitted that such a statute would be contrary to the Tenth Amendment to the United States Constitution.

In *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), this Court considered the federal government's authority to compel individual states to enforce federal regulations. In ruling that Congress lacked the authority to compel the States to enforce federal law, this Court stated:

> "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, **the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.** See *Coyle v. Smith*, 221 U.S. 559, 565, 31 S.Ct. 688, 689, 55 L.Ed. 853 (1911). The Court has been explicit about this distinction. 'Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States.' *Lane County v. Oregon*, 7 Wall., at 76." (Emphasis added, and as in original). *Id.*, 505 U.S. 144 at 162, 112 S.Ct. 2408 at 2421, 120 L.Ed.2d 120.

*New York, supra*, goes on to say:

"We have always understood that even where Congress has the authority under the



Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. *E.g., FERC v. Mississippi*, 456 U.S., at 762-766, 102 S.Ct., at 2138-2141; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 288-289, 101 S.Ct., at 2366; *Lane County v. Oregon*, 7 Wall., at 76. **The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.**" (Emphasis added.) *Id.*, 505 U.S. 144 at 166, 112 S.Ct. 2408 at 2423.

The position of the *amici* also finds support in language from *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958). While holding that the City of Chicago could not interfere with the mandate of the railroads (as common carriers) to provide transportation between railroad stations in Chicago, the local government retained significant police power:

> "We are fully aware that use of local streets is involved, but no one suggests that Congress cannot require the City to permit interstate commerce to pass over those streets. **Of course the City retains considerable authority to regulate how transfer vehicles shall be operated. It could hardly be denied, for example, that such vehicles must obey traffic signals, speed limits and**

> **other general safety regulations. Similarly the City may require registration of these vehicles and exact reasonable fees for their use of the local streets**. *Cf. Fry Roofing Co. v. Wood*, 344 U.S. 157, 73 S.Ct. 204, 97 L.Ed. 168; *Capitol Greyhound Lines v. Brice* , 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053." (Emphasis added.) *Id.*, at 88, 78 S.Ct. at 1069-1070.

Implicit in the *Chicago* case is the notion that Congress' authority is limited to the regulation (or, more accurately in this case, the protection) of interstate commerce. To the extent Congress might attempt to limit the distribution of police powers within a state (after permitting the state government to pass such safety regulations), such action would run afoul of the Constitution.

Given that there is an interpretation of the statute which does not raise this grave, constitutional doubt (i.e. silence manifested the intent of Congress to avoid the thicket of the intrastate distribution of police powers), the judgment of the Sixth Circuit Court of Appeals should be reversed, and judgment should be entered on behalf of the City of Columbus.

## CONCLUSION

The judgment of the Sixth Circuit should be reversed. 49 U.S.C. § 14501 should be interpreted in such a manner consistent with the intent of Congress and as would avoid constitutional doubt.

Respectfully submitted,



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